

FCC Proceeding 07-57
Patrick Sharpless
Citizen and Consumer
Public Comment, Electronically filed using ECFS on August 14, 2007

The Honorable Kevin J. Martin
Chairman, Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Public Comment and Submission for the Record regarding the Notice of Proposed Rule Making Adopted June 25, 2007, Released June 27, 2007, MB Docket No. 07-57, FCC 07-119.

Dear Chairman Martin and Fellow Commissioners:

As a concerned citizen and consumer following the Proposed Satellite Radio merger between Sirius Satellite Radio and XM Satellite Radio, I hereby submit my comments regarding the Notice of Proposed Rule Making seeking comment on whether the language in question constitutes a binding Commission rule and, if so, whether the Commission should waive, modify, or repeal the prohibition in the event that the Commission determines that the proposed merger, on balance, would serve the public interest.

Please submit my attached comments titled, *The 1997 SDARS Report & Order Transfer Language* into the public record.

Respectfully submitted,

Patrick Sharpless
Citizen and Consumer

The 1997 SDARS Report & Order Transfer Language

Notice of Proposed Rulemaking

The following language is from the applicable Notice of Proposed Rule Making:

As discussed below, because the proposed transfer conflicts with language prohibiting such a combination in the Commission's 1997 Order establishing the Satellite Digital Audio Radio Service ("SDARS"), this *Notice of Proposed Rule Making* ("*Notice*") seeks comment on whether the language in question constitutes a binding Commission rule and, if so, whether the Commission should waive, modify, or repeal the prohibition in the event that the Commission determines that the proposed merger, on balance, would serve the public interest.

Transfer. We note that DARS licensees, like other satellite licensees, will be subject to rule 25.118, which prohibits transfers or assignments of licenses except upon application to the Commission and upon a finding by the Commission that the public interest would be served thereby. Even after DARS licenses are granted, one licensee will not be permitted to acquire control of the other remaining satellite DARS license. This prohibition on transfer of control will help assure sufficient continuing competition in the provision of satellite DARS service.

The Applicants maintain that the above-quoted language is a policy statement under the Administrative Procedure Act ("APA") rather than a binding Commission rule because it was not codified in the Code of Federal Regulations. To the extent that the Commission considers the above quoted language in the *SDARS Report & Order* to be a binding rule prohibiting the proposed transfer of control, the Applicants request that the Commission waive, modify, or otherwise alter the rule to the extent necessary to permit the proposed merger. We seek comment on these contentions. We seek comment specifically on the Applicants' contention that the Commission should waive, modify, or otherwise alter the prohibition to the extent necessary to permit the merger because the proposed merger, on balance, would serve the public interest. The Commission reviews license transfer applications to determine whether grant of an application would serve the public interest, convenience, and necessity under Section 310(d) of the Act. The Commission's associated review of the Consolidated Application, pursuant to this standard, will include an assessment of whether the proposed transaction complies with specific provisions of the Act, other statutes, and the Commission's rules. If the Commission concludes that the transaction would not violate a statute or rule of continued applicability, it next will consider whether the transaction could result in public interest harms by substantially frustrating or

impairing the objectives or implementation of the Act or related statutes. The Commission generally weighs any potential public interest harms of a proposed transaction against any potential public interest benefits. The Applicants have the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest. The Applicants also contend that the prohibition need not be continued “because the preservation of two separate satellite radio licensees is no longer required to ‘help assure sufficient continuing competition,’” which, they maintain, was the original purpose of the restriction set forth in the 1997 *SDARS Report & Order*. Further, the Applicants assert that the Commission has sufficient justification to waive, modify or otherwise alter the prohibition and approve the proposed transfers of control because the competitive environment within the audio entertainment marketplace has changed since 1997, when the Commission adopted the *SDARS Report & Order*. Based upon these changed market conditions, the Applicants assert that continuation of the prohibition would not serve the public interest. We seek comment on this argument and request.

Breakdown of Applicable ‘Transfer’ Language

In order to facilitate understanding and eliminate confusion, it is a good idea to breakdown the applicable language in the ‘Transfer’ section of the Commission’s 1997 Order establishing the Satellite Digital Audio Radio Service (“SDARS”) into three different parts; doing so will simplify the analysis:

Part I We note that DARS licensees, like other satellite licensees, will be subject to rule 25.118, which prohibits transfers or assignments of licenses except upon application to the Commission and upon a finding by the Commission that the public interest would be served thereby.

This part states the applicability of rule 25.118 and identifies the exception to this rule. Specifically, the exception to rule 25.118 is the Commission must find the public interest would be served before the Commission will authorize a license transfer.

Part II Even after DARS licenses are granted, one licensee will not be permitted to acquire control of the other remaining satellite DARS license.

After the SDARS licenses are granted, one licensee will not be permitted to acquire control of the other remaining satellite DARS license. But nowhere does this part recognize the exception to rule 25.118, which, as described in **Part I** above, provides a means for the satellite radio licensees to apply for a license transfer and have the Commission approve it. That means is by serving the public interest. Further, it is highly suspect to believe the FCC would intend to include such restrictive language in the absence of sufficient discussion on the matter in prior proceedings. The truth is, language like this has no place in this 1997 *SDARS Report & Order*; it’s overly restrictive and fails to provide a remedy

for changing market conditions of the future which could render future interpretations of this language obsolete. As a practical matter, it would appear this language was placed in the 1997 *SDARS Report & Order* as the result of carelessness, or, as an illegitimate means to insulate an existing competitor, terrestrial radio in this case, from competing with a consolidated satellite radio competitor at some time in the future. It's not clear if the Commission responsible for this ambiguous language in the 1997 *SDARS Report & Order* intended to establish some sort of unwarranted protection for terrestrial radio from future satellite radio competition by attempting to prohibit a future merger with the use of ambiguous language like this, but the language is nonetheless ambiguous and enables opposition to this Consolidated Application to argue on behalf of ambiguous FCC Commission language. Because of this, the Commission today should recognize the ambiguous language and obsolete interpretations of this language is in conflict with the recognized exception to rule 25.118.

Part III This prohibition on transfer of control will help assure sufficient continuing competition in the provision of satellite DARS service.

This part is also in conflict with the recognized exception in Part I to rule 25.118. It's not clear if the applicable language 'This prohibition on Transfer of control' was intended to apply to the prohibition on Transfer of control identified in rule 25.118 of Part I, or, if it was intended to apply to the 'one licensee will not be permitted to acquire control of the other remaining satellite DARS license' language in Part II. In either case, there is no legitimate purpose for the ambiguous language which is today being interpreted by opponents of the Consolidated Application, like NAB, in such a way as to delay, obstruct and prevent this merger.

Further, there are other ways to help assure sufficient continuing competition in the provision of satellite DARS service. Look at the robust audio entertainment market that satellite radio competes in. There is competition everywhere. This speaks volumes about how the existing policies have served the public welfare by allowing a robust audio entertainment sector to thrive. We simply don't need ambiguous and overly restrictive Commission rules which serve to provide unfair competitive advantage to terrestrial radio and others, at the expense of satellite radio.

CONCLUSION

The ambiguous language and obsolete interpretations of the language in the 1997 *SDARS Report & Order* cannot be interpreted in such a way as to delay, obstruct or prevent this Consolidated Application; doing so would be improper. In other words, ambiguous Commission rules cannot be binding. Attempting to

legitimize an internally conflicted and ambiguous rule such as this one, is counterintuitive to the underlying purpose of protecting competition and not competitors. At this stage, it is far less important to investigate which Commissioner is responsible for authoring the language in the 1997 *SDARS Report & Order* which serves to provide unfair competitive advantage to terrestrial radio and perhaps other competitors, than it is for the Commission today to recognize how this ambiguous language and obsolete interpretations being made require a change to eliminate ambiguity and internal conflict so the public's business is not further delayed, obstructed or prevented due to this poorly written rule of yesterdecade.